UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
BRIAN LEE KINDIG,	)	CASE NO. 03-31167 HCD
	)	CHAPTER 7
	)	
DEBTOR.	)	
	)	
	)	
BRIAN LEE KINDIG,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 03-3077
	)	
UNITED STATES OF AMERICA,	)	
	)	
DEFENDANT.	)	

Appearances:

Loraine P. Troyer, Esq., attorney for plaintiff, 121 North Third Street, Goshen, Indiana 46526; and

Robin W. Morlock, Esq., Assistant United States Attorney, 5400 Federal Plaza, Suite 1500, Hammond, Indiana 46320.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 25, 2004.

Before the court is the Complaint to Discharge Student Loan filed by the plaintiff Brian Lee Kindig ("plaintiff" or "debtor") on June 12, 2003, and the Answer filed by the defendant United States of America ("government") on July 22, 2003. Trial on the complaint was held on December 2, 2003, and the matter was taken under advisement. For the reasons that follow, the court now denies the debtor's Complaint.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and

determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The debtor filed his chapter 7 bankruptcy petition on March 7, 2003, and commenced this adversary proceeding seeking the discharge of his student loans on June 12, 2003. At issue are twelve student loans issued by the U.S. Department of Education between September 1995 and January 1999 to fund the debtor's education at Ferris State University in Grand Rapids, Michigan. As of April 25, 2003, the debtor owed $22,626.19 on the student loans; at that time, he had not made any payments on the debt. The debtor stated in his complaint that he is a paraplegic without the use of his lower extremities and that he suffers from a neurogenic bladder. He asserted that he cannot pay his student loans now or in the foreseeable future. Because the burden of the student loans imposed a hardship on him which presents a threat to his continuing health and emotional well-being, he asked that the debt be discharged pursuant to 11 U.S.C. § 523(a)(8). The government, in its Answer, denied that the repayment of the student loans imposed an undue hardship to the plaintiff.

At the trial on the complaint, the debtor and his mother testified. Brian Lee Kindig, the 29 year-old debtor, reported that he was paralyzed following an automobile accident in October 1992 and now is confined to a wheelchair. For his disability, he had received social security disability payments of $400-$500 a month. After the accident, however, he wanted to find employment that was appropriate to his disability. He attended Ferris State University for seven years, until 1998, and received an associates degree in printing technology. However,

he has not been able to get a job in his field, despite extensive effort on his part and some assistance from a vocational rehabilitation advisor.

In January 2003, he began work with the Elkhart School Corporation as a paraprofessional, a teacher's aid. In October 2003, he became a salaried employee and received insurance. His pay stubs indicated that his gross pay is $496 for each two-week period and that, with insurance deductions, his net pay is $351. He stated that he gets no income in the summer, when the school is closed.

The debtor explained that his social security supplemental income ("SSI") had been $514.70 a month, but was reduced in October 2003 to $159 a month because he earns a salary of more than $800 a month. He testified that his SSI income is even lower at the present time, $112 a month, in order to return some earlier overpayments. The annuity payment he receives, in the amount of $190, is automatically turned over to the chapter 7 Trustee. Moreover, the annuity will be discontinued in September 2005. In summary, the debtor testified that his current monthly income is $496 every two weeks in salary and $112 a month in social security supplemental income.[1]

The debtor testified that he is a single man with no dependents, that he lives with his parents, and that he has the following expenses each month:

$266.33 – van insurance
$ 63.59 – satellite TV
$ 80.00 – for gas
$ 150.00 – for food
$ 100.00 – for utilities

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[1] On Schedule I, the debtor listed his income as of March 7, 2003, the date he filed his chapter 7 petition. It stated that he was employed by the Elkhart Community Schools and listed this income:

$1,087.67	Gross wages, salary, commissions
307.67	Deductions
780.00	Net monthly take home pay
514.70	Social security assistance
190.00	Annuity
$1,484.70	TOTAL MONTHLY INCOME

$ 60.00 – dog care
$ 50.00 – van expenses
$ 80.00 – clothing, miscellaneous

His testimony at trial was that his total expenses amounted to $849.92.[2]

The debtor testified that he sees no possibility of a change in his circumstances. His doctors told him that his life expectancy is shortened as a result of the paralysis. He stated that there has been no progression of the paralysis but that he has infections and arthritis now. He also testified that he listed eleven unsecured credit card debts on his bankruptcy schedules but that his largest debt is his student loan debt. He conceded that he had not responded to the letters he received from the Department of Education concerning those loans. When collection agents called, he offered to make reduced payments of perhaps $50 a month; however, he received a cold response to his offer. He told the court that he now can afford to pay about $11 a month toward the loans. He explained that he manages on his small income only because his parents let him live with them and pay only partial bills.

Mrs. Sandra J. Kindig, the debtor's mother, testified that she, her husband and her son have lived in the same house in Elkhart for thirty years. Like her son, she is employed as a paraprofessional or teacher's aid in the Elkhart Community School System; they both earn the same salary. Her husband is a carpenter for a building and remodeling company. As a family, they do not earn much money. She testified that she went with

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[2] On Schedule J, the debtor listed these expenses as of the date he filed bankruptcy:

$200.00	rent
$100.00	utilities
$ 50.00	home maintenance
$300.00	food
$100.00	clothing
$ 20.00	medical and dental expenses
$100.00	transportation (other than car payments)
$250.00	recreation, entertainment, newspapers, magazines
$283.00	auto insurance
$1,403.00	TOTAL MONTHLY EXPENSES

Brian to most of his interviews, to see if buildings were wheelchair-accessible. She told the court how hard Brian tried to obtain each job. He even applied to work at WalMart as a door greeter, she said, but the store did not hire him.

In their closing arguments, both the debtor's attorney and the government attorney applauded the debtor's efforts to learn new skills at Ferris State and to seek employment in order to support himself. However, counsel for the debtor asserted that the debtor did not find employment in his chosen field. Although he was employed, she pointed out that he was getting less social security income and a small salary. She argued that it would be a hardship for him not to have the student loans discharged. The government attorney disagreed. He contended that there was no evidence of undue hardship in making the student loan payments and that the debt should not be discharged. At the end of the trial, the court took the dischargeability issue under advisement.

Discussion

Section 523(a)(8) of the Bankruptcy Code provides:

> (a) A discharge . . . does not discharge an individual debtor from any debt —
> . . .
> (8) for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit . . . or for an obligation to repay funds received as an educational benefit, scholarship, or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

11 U.S.C. § 523(a)(8). Under this provision, therefore, student loans are dischargeable in a debtor's bankruptcy if the debtor shows that paying the loans would cause undue hardship to the debtor and his or her dependents. *See O'Hearn v. Educational Credit Management Corp. (In re O'Hearn)*, 339 F.3d 559, 564 (7th Cir. 2003). However, § 523(a)(8)(B) does not define "undue hardship." *See id.* It has been left to the courts to develop and apply tests for determining whether the failure to discharge student loans causes undue hardship. In *In re Roberson*, 999 F.2d 1132 (7th Cir. 1993), the Seventh Circuit Court of Appeals adopted the test for determining "undue hardship" first set forth in 1987 by the Second Circuit in *Brunner v. New York State Higher Educ.*

Services Corp., 831 F.2d 395 (2d Cir. 1987). *Roberson* required a debtor to demonstrate undue hardship by showing "(1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for [himself] and [his] dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans." *Roberson*, 999 F.2d at 1135. The debtor bears the burden of establishing each of the three factors by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991).

The court first considers whether the debtor's financial condition will allow him to maintain a minimal standard of living for himself. On the Schedule I list of his current monthly income, the debtor reported that he earned $1,484.70 each month. In addition, he testified that he lives in his parents' home with them. On the Schedule J list of his monthly expenditures, he reported expenses of $1,403.00 without factoring in his student loan debt. The debtor's schedules thus indicate that he has excess income of about $80 each month. At trial, the debtor testified that his monthly income was about $1100.00 and that his monthly expenses were $849.92. Those figures reflect an excess income of about $250.00. Based on either reporting of his current income and expenses, therefore, the court finds that the debtor can maintain a minimal standard of living for himself. *See, e.g., U.S. Department of Education v. Gerhardt (In re Gerhardt)*, 348 F.3d 89, 92 (5th Cir. 2003) (finding that, because the debtor's monthly expenses exceeded his monthly income, he established the first *Brunner* element); *In re O'Hearn*, 339 F.3d at 565 (measuring minimal standard of living by reference to the IRS housing and utility allowance for the debtor's region); *Goulet v. Educational Credit Management Corp.*, 284 F.3d 773, 778 (7th Cir. 2002) (affirming that the debtor, whose expenses were four times greater than his income, established the first element of § 523(a)(8)). The debtor thus has not established the first prong of the *Roberson* test.

The second factor requires the debtor to demonstrate that additional circumstances exist that would indicate that the debtor's state of affairs is likely to continue for a significant portion of the repayment period.

According to *Roberson*, "the dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment." *In re Roberson*, 999 F.2d at 1136. This factor requires evidence "of additional, exceptional circumstances, strongly suggestive of continuing inability to repay over an extended period of time." *Id.* In *Goulet*, the Seventh Circuit focused on this prong of the "undue hardship" test. It noted that the debtor's alcoholism and felony conviction were circumstances that "predated his attendance at [graduate school] and his acceptance of the responsibility of these student loans." *Goulet*, 284 F.3d at 779. Because the debtor chose to return to school and to assume the debt, stated the court, he clearly believed that he could earn enough after his schooling to repay the loan as he had promised to do. The appellate court concluded: "[The debtor] has serious problems, but we are reluctant to label these pre-loan problems 'additional, exceptional circumstances' so as to constitute 'undue hardship' for purposes of Section 523(a)(8)." *Id.* The court further recognized that nothing in the record indicated that his problems were insurmountable, that he was unable to work, or that he was unemployable in other areas. It found that the debtor could apply himself when he chose to do so and that he "simply failed to diligently pursue employment." *Id.* It therefore concluded that the debtor's "condition has not reached the 'certainty of hopelessness' that would lead us to find that his condition is likely to persist for a significant portion of the repayment period." *Id.*

In this case, the debtor's accident and resulting disability predated his attendance at Ferris State and his acceptance of the responsibility of the student loans. His credible testimony indicated that he believed his training in printing technology would provide future earnings potential for him as a paraplegic. The court finds that he voluntarily assumed the student loan debt based on that belief. In addition, nothing in the record indicates that his medical circumstances are worsening or that other conditions reflect the "certainty of hopelessness" required under this prong of the test. *See In re Roach*, 288 B.R. 437, 445 (Bankr. E.D. La. 2003) (reviewing the facts for "additional circumstances" that would have an impact on the debtor's future earning potential and that were not present when the debtor applied for the loans or that have worsened since then). The court

determines, therefore, that the pre-loan circumstance of his disability is not an additional, exceptional circumstance under § 523(a)(8).

The court found credible the testimony of the debtor and his mother that he tried hard to find employment in the field of printing technology, in other fields, and with other businesses, including WalMart. To his credit, the debtor has proven himself to be employable in other areas, for he now has a job as a paraprofessional in the Elkhart School Corporation. Moreover, in light of the debtor's youthful age, his intelligent demeanor, his attainment of an associate's degree, and his determination, the court believes that it will not be impossible for him to find more satisfying or more lucrative work in the future. *See In re Gerhardt*, 348 F.3d at 92 (concluding that proof of current financial straits is not sufficient and that proof of a complete incapacity to pay debts in the future, for reasons outside his control, is required). In sum, the court finds that the debtor's hardship is "real, but . . . it is not 'undue.'" *In re Brightful*, 267 F.3d 324, 331 (3d Cir. 2001).

The third element in the *Roberson* test is the good-faith factor: "With the receipt of a government-guaranteed education, the student assumes an obligation to make a good faith effort to repay those loans, as measured by his or her efforts to obtain employment, maximize income, and minimize expenses." *Roberson*, 999 F.2d at 1136. In *Goulet*, the Seventh Circuit stated that the debtor had attempted to minimize expenses by living with his mother, but had not been diligent at seeking employment. However, it noted that "it is hard to see good faith in paying nothing when obtaining payment deferrals" on the loans. *Id*. at 780.

In the case before this court, the debtor admitted that he paid nothing toward his loans and that he answered none of the Department of Education letters. He claimed that he telephoned the government office, offered to pay $50 a month toward the loans, and was rebuffed in a rude manner. However, he also testified that he may have spoken with a collection agent rather than a government agent. Jessica Liu, the government's loan analyst in its litigation branch, testified by written stipulation that there was no record of any contact from the debtor regarding his student loans. *See* Gov't. Ex. 16 at ¶ 6(e). She further stated that the government issued

seventeen letters to the debtor suggesting possible options in paying for the debts, but received no response from him. *See id*. at ¶ 6(f). Regardless of whether the debtor made partial payment offers on the telephone, there is no question that he failed to respond in writing to the government's payment option offers or to make any payment on the debt. His failure to demonstrate any good faith effort to repay the outstanding loans constitutes a failure to establish the third prong of the *Roberson* test.

The court considered the totality of the debtor's circumstances when examining each factor of the § 523(a)(8) three-part test. It was a significant fact, in the view of the court, that the debtor was a paraplegic when he obtained the loans and signed the promissory notes promising to repay the loans. He borrowed for a college education expecting a well-paid job as a consequence. However, "[i]f the leveraged investment of an education does not generate the return the borrower anticipated, the student, not the taxpayers, must accept the consequences of the decision to borrow." *Roberson*, 999 F.2d at 1137. The fact that his plan did not come to fruition does not excuse him from meeting his student loan obligations. The court found that the debtor's failure to pay back even a small portion of the debt exhibited a lack of good faith on his part and thus a failure to establish the third prong of the *Roberson* test under § 523(a)(8).

Although the court now finds that the student loan debts are excepted from the debtor's discharge, it makes one further note. The stipulation filed by the parties as Government Exhibit 16 states that the "records of the Department of Education do not reflect that Mr. Kindig is paralyzed." Gov't. Ex. 16 at 3, ¶ 6(i). The court recognizes that, pursuant to government regulations, a borrower's condition of disability that existed before the student loans were granted does not allow for the discharge of the borrower's loans. Nevertheless, the court finds that the government's present knowledge of the debtor's paralysis may present a justification for the student loan obligations to be renegotiated. The court has determined that the debtor lives frugally with his parents and is employed. The government should establish a long-term payment schedule that will take into account his modest wages, frugal lifestyle, and lack of salary during the summer months.

Conclusion

For the reasons presented above, the court finds that the debtor Brian Lee Kindig has failed to demonstrate, by a preponderance of the evidence, that the repayment of his student loans would impose an undue hardship on him. He thus has not met his burden of proving that he is entitled to a discharge of those debts pursuant to 11 U.S.C. § 523(a)(8). The court finds, therefore, that the student loan debts are excepted from the debtor's discharge.

The court denies the debtor's Complaint to Discharge Student Loan.

SO ORDERED.

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HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT